Abu Bakar bin Pangis & Ors v Tung Cheong Sawmill Sdn Bhd & Ors and another suit

HIGH COURT (MIRI) — SUIT NOS 22–16 OF 2003(MR) AND 22–19 OF 2003(MR)
STEPHEN CHUNG JC
30 MARCH 2012

Native Law and Custom — Land dispute — Customary rights over land — Claim of inheritance of land from ancestors — Alienation of land alleged to affect customary land — Whether native customary rights still subsist — Whether in breach of art 5(1) of the Federal Constitution — Whether individual plot of land claimed properly and sufficiently identified — Whether provisional leases lawful — Whether claims proven on balance of probabilities — Sarawak Land Code (Cap 81) s 18

In the present suits, the plaintiffs alleged that the second and the third defendants' actions in alienating the lands to the first defendant which affected areas of the plaintiffs' native customary rights ('NCR') lands were unlawful, null and void. The plaintiffs submitted that their ancestors originated from Sungai Kedayan in Brunei, migrated and settled on the lands situated near to Kampung Selanyau in 1909 ('plots of the land'). It was alleged that the date 1909 was a date found inscribed on a tombstone located within their NCR lands. The plaintiffs further submitted that in 1920, a mysterious illness or epidemic affected their ancestors, forcing them to leave the lands settled by them and to move to other villages but their ancestors however continued to farm the NCR lands which they had cleared. The plaintiffs claimed that their NCR over the lands which they had inherited from their ancestors still subsisted and that the actions of the second and third defendants were unconstitutional and violated art 5(1) of the Federal Constitution. It was the plaintiffs' contention that they have legitimate expectations that the land would be given to them under s 18 of the Sarawak Land Code instead of being given to the first defendant and that that their rights, traditions, cultures and livelihoods would not be disrupted, extinguished or be restricted by the issue of the provisional leases to the first defendant. The defendants argued that the plaintiffs have not in any way properly and sufficiently identified the individual plot of land claimed by each of them. The defendants submitted that the second and the third defendants acted properly and legally in issuing the two provisional leases to the first defendant. It was further submitted that prior to the grant and issuance of the provisional leases to the first defendant, the relevant government departments did investigate and check all claims and or entitlements to the lands to be alienated to the first defendant but did not have any notice of any claims by the plaintiffs or any of the plaintiffs and or have not

found any such claims to be valid, proper or substantiated in law or in fact. Therefore, the plaintiffs in each of the two suits, inter alia, sought a declaration that the plaintiffs have acquired NCR over their plots of land that the same still subsist and a declaration that the acts of the second and third defendants in issuing the provisional leases to the first defendant, in so far as they affected the plots of lands claimed by the plaintiffs, were unlawful, null and void. The plaintiffs prayed for an order that the second defendant issue to each of the plaintiffs an individual title of their individual plots of land. The issue that arose for the court's determination was whether the plaintiffs had proven their NCR claims to the lands, on a balance of probabilities.

Held, dismissing the suits with costs:

(1) None of the plaintiffs in either suit had been born yet in 1909 or 1910 or the 1920's or 1930's when their ancestors had purportedly cleared and settled on the lands. PW1 was born in 1940, PW2 in 1949 and PW5 in 1943. Their evidence or accounts of their respective NCR claims were based on what they heard or what they were told or from family oral history. None of them had exhibited their birth certificate which would have shown the name of their parents and their place of birth. These would have substantiated their claims that they were born at their village or at the claimed NCR lands (see para 36).

(2) The evidence in the form of an article brought forth by the plaintiffs did not refer to any mysterious illness or epidemic which caused the plaintiffs' ancestors to move to other villages. If the mysterious illness or epidemic was the cause of the migration, the article would have made reference to it since it was based on interviews with the inhabitants of Kg Selanyau which purportedly included some of the plaintiffs (see para 43).

(3) The evidence showed that in 1996, parts of the lands claimed by the plaintiffs were issued with a timber licence by the Forests Department to the first defendant. Since then the first defendant had entered into the licensed areas to legally harvest timbers pursuant to the timber licence. The licence was renewed annually. Another timber licence was issued to Yak Lee Timber Company Ltd in 1966 too, and this was confirmed by the first plaintiff during his cross-examination when he stated that he had worked for this timber company for many years (see para 44).

(4) The aerial photographs taken in 1947 and 1951 for the Sarawak Government showed that the areas claimed by the plaintiffs in both suits were then virgin jungles. These contradicted their claims that their ancestors had in 1909 and 1910 cleared the virgin jungles, planted paddy and fruit trees and had settled on the lands since then. Although, the plaintiffs averred that the jungles or forests had grown back from 1909 to 1947 or 1951 so that they again looked like virgin jungles from the air when the aerial photographs were taken; there was no such evidence. If

their ancestors had been tending to their farms as alleged, how could they become jungles or forests again (see para 46). A

[Bahasa Malaysia summary

Dalam guaman-guaman ini, plaintif-plaintif mengatakan bahawa tindakan-tindakan defendan-defendan kedua dan ketiga dalam memberi pemerolehan tanah-tanah kepada defendan pertama yang melibatkan hak-hak adat anak watan ('HHAAW') tanah-tanah plaintif-plaintif adalah menyalahi undang-undang, terbatal dan tidak sah. Plaintif-paintif berhujah bahawa nenek moyang mereka berasal dari Sungai Kedayan di Brunei, telah berhijrah dan menetap atas tanah-tanah tersebut yang terletak berhampiran Kampung Selanyau pada tahun 1909 ('plot-plot tanah'). Adalah dikatakan bahawa tarikh tahun 1909 itu merupakan tarikh yang dijumpai tertulis pada batu nisan yang terletak dalam kawasan tanah-tanah HHAAW mereka. Plaintif-plaintif selanjutnya berhujah bahawa pada tahun 1920, penyakit atau wabak misteri telah merebak di kalangan nenek moyang mereka, memaksa mereka meninggalkan tanah-tanah yang didiami oleh mereka dan berpindah ke perkampungan lain tetapi nenek moyang mereka bagaimanapun meneruskan bercucuk tanam atas tanah-tanah HHAAW tersebut yang diteroka oleh mereka. Plaintif-plaintif mendakwa bahawa HHAAW mereka ke atas tanah-tanah tersebut yang diwarisi oleh mereka daripada nenek moyang mereka masih wujud dan tindakan-tindakan defendan-defendan kedua dan ketiga adalah tidak berperlembagaan dan bertentangan perkara 5(1) Perlembagaan Persekutuan. Ia adalah hujah plaintif-plaintif bahawa mereka mempunyai jangkaan sah bahawa tanah itu akan diberikan kepada mereka di bawah s 18 Kanun Tanah Sarawak dan bukan kepada defendan pertama dan bahawa hak-hak, adat resam, budaya dan kehidupan mereka tidak akan diganggu, dilupuskan atau disekat oleh isu pajakan-pajakan sementara kepada defendan pertama. Defendan-defendan berhujah bahawa plaintif-plaintif tidak dalam apa cara yang wajar dan mencukupi mengenalpasti plot tanah individu yang dituntut oleh setiap daripada mereka. Defendan-defendan berhujah bahawa defendan-defendan kedua dan ketiga telah bertindak sewajarnya dan secara sah dengan mengeluarkan dua pajakan sementara kepada defendan pertama. Selanjutnya adalah dihujahkan bahawa sebelum pemberian dan pengeluaran pajakan-pajakan sementara itu kepada defendan pertama, jabatan kerajaan berkaitan telah menyiasat dan memeriksa semua tuntutan atau hak-hak ke atas tanah-tanah yang akan diberi milik kepada defendan pertama tetapi tidak mempunyai apa-apa notis berhubung tuntutan oleh plaintif-plaintif atau mana-mana plaintif tersebut dan atau tidak mendapati apa-apa tuntutan sedemikian sebagai sah, wajar atau disokong dari segi undang-undag atau fakta. Oleh itu, plaintif-plaintif dalam setiap dua guaman itu, antara lain, memohon deklarasi bahawa tindakan-tindakan defendan-defendan kedua dan ketiga dalam mengeluarkan pajakan-pajakan sementara itu kepada defendan pertama, setakat mana ia menjejaskan plot-plot tanah tersebut yang dituntut oleh plaintif-plaintif adalah menyalahi

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undang-undang, terbatal dan tidak sah. Plaintif-plaintif memohon untuk perintah bahawa defendan kedua mengeluarkan kepada setiap plaintif-plaintif itu hak milik individu ke atas plot-plot tanah individu mereka. Isu yang timbul untuk ditentukan oleh mahkamah adalah sama ada plaintif-plaintif telah membuktikan bahawa tuntutan-tuntutan HHAAW mereka ke atas tanah-tanah tersebut adalah atas imbangan kebarangkalian.

Diputuskan, menolak guaman-guaman dengan kos:

(1) Tiada di kalangan plaintif-plaintif dalam mana-mana guaman telah dilahirkan pada era tahun 1909 atau 1910an atau 1920an atau 1930an semasa nenek moyang mereka dikatakan meneroka dan mendiami atas tanah-tanah tersebut. PW1 telah dilahirkan pada tahun 1940 dan PW5 pada tahun 1943. Keterangan mereka tentang tuntutan HHAAW mereka berdasarkan apa yang didengar oleh mereka atau apa yang diberitahu kepada mereka atau daripada sejarah lisan keluarga. Tiada seorang daripada mereka yang mengemukakan sijil kelahiran mereka yang akan menunjukkan nama ibubapa mereka dan tempat lahir mereka. Butir-butir berikut dapat menyokong tuntutan-tuntutan mereka bahawa mereka telah dilahirkan di kampung mereka itu atau di atas tanah-tanah HHAAW yang dituntut itu (lihat perenggan 36).

(2) Keterangan dalam bentuk artikel yang dikemukakan oleh plaintif-plaintif tidak merujuk kepada apa-apa penyakit atau wabak misteri yang menyebabkan nenek moyang mereka berpindah ke kampung lain. Jika penyakit atau wabak itu telah menyebabkan migrasi itu, artikel tersebut akan membuat rujukan kepadanya oleh kerana ia adalah berdasarkan temubual dengan penduduk Kg Selanyau yang dikatakan termasuklah beberapa orang daripada plaintif-plaintif tersebut (lihat perenggan 43).

(3) Keterangan menunjukkan bahawa pada tahun 1996, sebahagian daripada tanah-tanah yang dituntut oleh plaintif-plaintif telah dikeluarkan lesen pembalakan oleh Jabatan Perhutanan kepada defendan pertama. Sejak itu defendan pertama telah memasuki kawasan-kawasan yang dilesenkan itu secara sah untuk melakukan pembalakan menurut lesen pembalakan itu. Lesen itu diperbaharui setiap tahun. Satu lagi lesen pembalakan juga telah dikeluarkan kepada Syarikat Pembalakan Yak Lee Bhd pada tahun 1966, dan ini disahkan oleh plaintif pertama dalam pemeriksaan balas apabila dia menyatakan bahawa dia telah bekerja untuk syarikat pembalakan ini sejak bertahun lamanya (lihat perenggan 44).

(4) Gambar dari udara yang diambil pada tahun 1947 dan 1951 untuk Kerajaan Sarawak menunjukkan bahawa kawasan-kawasan yang dituntut oleh plaintif-plaintif dalam kedua-dua guaman tersebut merupakan hutan dara. Ini bercanggah dengan tuntutan-tuntutan

mereka bahawa nenek moyang mereka telah pada tahun 1909 dan 1910 telah meneroka kawasan hutan itu, menanam padi dan pokok buah-buahan dan telah mendiami atas tanah-tanah tersebut sejak itu. Walaupun begitu, plaintif-plaintif menegaskan bahawa hutan itu telah tumbuh balik dari tahun 1909 hingga 1947 atau 1951 di mana ia kembali kelihatan seperti hutan dara daripada udara apabila gambar dari udara diambil; tiada keterangan sedemikian. Jika nenek moyang mereka telah bercucuk tanam sebagaimana dikatakan, bagaimana kawasan tersebut kembali menjadi hutan belantara (lihat perenggan 46).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 682–711.

Cases referred to

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204; [2010] 1 LNS 114, HC (refd)

Ara binte Aman & Ors v Superintendant of Lands and Mines, 2nd Division [1975] 1 MLJ 208 (refd)

Racha ak Urud @ Peter Racha Urud & Ors v Ravencourt and Ors MR-21–4 of 2011 (unreported) (refd)

Sop Plantations (Suai) Sdn Bhd v Ading Ak Layang & Ors [2004] 4 MLJ 180, HC (refd)

Superintendent of Lands & Surveys, Bintulu v Nor anak Nyawai & Ors [2005] MLJU 266; [2005] 3 CLJ 555, CA (refd)

Tapah bin Bangkol v Superindant of Lands and Surveys [1999] 3 MLJ 588, HC (refd)

TR Nyutan ak Jami & Ors v Lembaga Pembangunan Dan Lindungan Tanah & Ors, Kuching High Court Suit No 22–249 of 1998 (unreported) (refd)

Legislation referred to

Federal Constitution art 5(1)
Government Proceedings Act 1956
Sarawak Land Code (Cap 81) ss 2, 5(1), (2), 10, 18, 28, 84
Sarawak Land Surveyers Ordinance 2011

Baru Bian (Baru Bian & Co) for the plaintiffs.
Victor Wong (Victor Wong & Chiew Advocates) for the first defendant.
Jospeh Chioh (SAG Chambers) for the second and third defendants.

Stephen Chung JC:

[1] These two suits were directed to be jointly tried and were part-heard before the previous presiding High Court judge. Parties have agreed for the

joint-trial to be continued before me. The plaintiffs altogether called eight witnesses and the defendants three witnesses for the joint-trial.

[2] In Suit No 22–16 of 2003, the plaintiffs testified that they are Kedayans by race and are natives of Sarawak. The three plaintiffs sued on behalf of themselves and 150 others and they claimed that they were the occupiers, owners and or claimants of native customary rights ('NCR') over individual plots of land claimed and or owned by them situated at Sibuti.

[3] The plaintiffs asserted that at all material times they have acquired and or inherited NCR over all those areas of land delineated in a map and therein shaded in orange. The map is marked 'A' and attached to the statement of claim (exh P1(A)). The individual plots with the acreage delineated in the map have been identified and agreed by the plaintiffs among themselves to belong to the individual plaintiff whose name is stated within each plot as shown in the map. The areas claimed by the plaintiffs in this suit as shown in the map added to approximately 2,915.78 acres.

[4] In Suit No 22–19 of 2003, the plaintiffs testified that they are all natives of Sarawak, are locally referred to as 'Jati Mirik' and professed the religion Islam. They considered themselves to be Malays by race.

[5] In Suit No 22–19 of 2003, the three plaintiffs sued on behalf of themselves and 90 others and they claimed that they were the occupiers, owners and or claimants of NCR over the individual plots of land claimed and or owned by them situated at Kampung Bakam.

[6] The plaintiffs also claimed that at all material times they have acquired and or inherited NCR over all those areas of land delineated in a map and shaded in orange in a map which is also marked 'A' and attached to the statement of claim (exh P8). The individual plots with the acreage delineated in the map have been identified and agreed by the plaintiffs among themselves to belong to the individual plaintiff whose name is stated within each plot as shown in the map. The areas claimed by the plaintiffs in this suit as shown in the map added to approximately 2,480 acres.

[7] The evidence showed that on 14 April 1997, the second and the third defendants had alienated a parcel of land and issued a provisional lease to this parcel of land which is described as Lot 3927 Lambir Land District containing an area of 1,004 hectares to the first defendant. The perimeter of this parcel of land overlaps with or is similar to the perimeter of the NCR lands of the plaintiffs claimed by them in Suit 22–19 of 2003.

[8] The evidence showed that on 6 February 2001, the second and the third

defendants alienated another parcel of land and issued a provisional lease to the land which is described as Lot 3935 Lambir Land Districts containing an area of 1,180 hectares to the first defendant. The perimeter of this parcel of land overlaps with or is similar to the perimeter of the NCR lands of the plaintiffs claimed by the plaintiffs in Suit 22–16 of 2003.

[9] In both suits the plaintiffs claimed that the second and third defendants' actions in alienating the lands to the first defendant which areas included the plaintiffs' NCR lands were unlawful, null and void. The plaintiffs said that there was no extinguishment of their NCR in accordance with the provisions of any existing laws prior to the alienations of the lands and the issuance of the provisional leases to the first defendant. The plaintiffs claimed that their NCR over the lands still subsist and that the actions of the second and third defendants were unconstitutional being in violation of art 5(1) of the Federal Constitution.

[10] The plaintiffs claimed that they have legitimate expectations that their rights, traditions, cultures and livelihoods would not be disrupted, extinguished or be restricted by the issue of the provisional leases to the first defendant. The plaintiffs also claimed that they have the legal expectations that the lands which they claimed under NCR would be given to them under s 18 of the Sarawak Land Code instead of being given to the first defendant.

[11] The plaintiffs in each of the two suits, inter alia, sought a declaration that the plaintiffs have acquired NCR over their plots of land, that the same still subsist and a declaration that the acts of the second and the third defendants in issuing the provisional leases to the first defendant, in so far as they affected the plots of lands claimed by the plaintiffs, were unlawful, null and void. The plaintiffs prayed for an order that the second defendant do forthwith issue to each of the plaintiffs an individual title in respect of their individual plot of land as identified in the map annexed to each statement of claim.

[12] The defendants denied the plaintiffs' allegations and submitted that the plaintiffs have not acquired and did not have any NCR over the areas shaded in orange in the map attached to the respective statement of claim or any part thereof. It was submitted that the plaintiffs have not in any way properly and sufficiently identified the individual plot of land claimed by each of them.

[13] The defendants submitted that the second and third defendants acted properly and legally in issuing the two provisional leases to the first defendant. It was submitted that prior to the grant and issuance of the provisional leases to the first defendant, the relevant government departments did investigate and check all claims and or entitlements to the lands to be alienated to the first

defendant but did not have any notice of any claims by the plaintiffs or any of the plaintiffs and or have not found any such claims to be valid, proper or substantiated in law or in fact.

[14] Although the defendants have put the plaintiffs to strict proof thereof, the defendants have not led any evidence to establish that the plaintiffs are not Kedayans or Jati Mirik or natives of Sarawak. Under native customs in Sarawak, a native of Sarawak can create and acquire NCR over land by clearing virgin jungle and farming the land which has been cleared or inheriting the native customary lands from their ancestors. These customs have been recognised and codified in legislations in Sarawak. Section 2 of the Sarawak Land Code defines native customary land to include land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January 1958, and still subsist as such. Pursuant to s 5(1), as from 1 January 1958, NCR may be created in accordance with the native customary law of the community concerned by any of the methods specified in sub-s (2), if a permit is obtained under s 10.

[15] The burden is on the plaintiffs to prove the acquisition of NCR in accordance with the laws of Sarawak in respect of the lands claimed by them. It must be proven by cogent evidence and not by bare assertions: see *Ara binte Aman & Ors v Superintendant of Lands and Mines, 2nd Division* [1975] 1 MLJ 208, *Tapah bin Bangkol v Superindant of Lands and Surveys* [1999] 3 MLJ 588, *Sop Plantations (Suai) Sdn Bhd v Ading Ak Layang & Ors* [2004] 4 MLJ 180.

[16] The first plaintiff Abu Bakar bin Pangis ('PW1') is a community leader of the Kedayans. He was born in 1940, appointed a *Penghulu* of the Kedayan community in Sibuti in 1978 and became a *Pemanca* in 1994. He said that the 153 plaintiffs in Suit 22–16 of 2003, including himself, lived in 13 different villages ie Kampung Satap (10km), Kampung Selanyau (5km), Kampung Kawang (10km), Kampung Danau (8km), Kampung Opak (4km), Kampung Kejapil (12km), Kampung Batu Satu Beraya (2km), Kampung Keluru Tengah (12km), Kampung Terhad (7km), Kampung Bungai (20km), Kampung Angus, Kampung Peluang Kelulit and Kampung Nyalau. The distance in bracket indicates the distance of each village from the claimed NCR lands. Both Kampung Peluang Kelulit and Kampung Nyalau are very far from the NCR lands. None of the 13 villages are situated within their claimed NCR lands or Lot 3935.

[17] He said that their ancestors originated from Sungai Kedayan in Brunei, migrated and settled on the lands situated near to Kampung Selanyau in 1909 ie on the different plots of land as shown in the map marked 'M' (exhs P1(A) and P1(B)). He said the date 1909 was a date which they found inscribed on a tomb stone located within their NCR lands.

[18] PW1 said that in the year 1920, a mysterious illness or epidemic affected their ancestors, forcing them to leave the lands settled by them and to move to Kampung Satap, Kampung Uban, Kampung Opak, Kampung Danau, Kampung Kelulit and Kampung Nyalau and other *kampungs*. PW1 said that their ancestors however continued to farm the NCR lands which they had cleared. He testified that the lands as shown in the map are located within the perimeter of Kampung Opak, Kampung Batu Satu Beraya and Kampung Selanyau. He said there are two graveyards used by their ancestors and themselves, one situated at Sungai Jalid and the other at Sungai Payau.

[19] He said that the 153 plaintiffs inherited the lands from their ancestors which were planted with fruit trees. PW1 said that they had several meetings regarding their NCR claims and that each of the plaintiffs had identified their individual plot of land which they had inherited from their ancestors and he had spoken to each plaintiff to verify their claim. PW1 said that each of the plaintiffs had signed their respective 'Surat Pengesahan dan Pengakuan' in his presence (exh P2). They then instructed Encik Dahlan bin Hj Gani ('PW4') to survey their NCR lands based on the forms. Subsequently each of the plaintiffs had identified their individual plot of land to PW4 who then prepared the map M (exh P1(A)) which set out the locality and acreage of each plot of land. He together with *Penghulu* Salim bin Hj Ebrahim ('PW2') signed on exh P1(A) to confirm the plaintiffs' claims to the NCR lands.

[20] PW1 said that he gathered all the information of the plaintiffs' claims to their respective individual plot of land and wrote a letter dated 10 August 2001 (exh P3) to the Superintendent of the Lands and Surveys, Miri Division ie the second defendant. There was no reply to this letter.

[21] PW1 said that they then heard rumours in 2001 that the different parcels of land which they had farmed had been alienated and a provisional lease issued to the first defendant. He together with PW2 and PW3 (Sapar bin Ismail) went to the Lands and Surveys, Miri to make an enquiry and they found out that their lands had indeed been given to the first defendant as Lot 3935 Lambir Land District.

[22] He said that they were never consulted or told of the alienation. They also did not know of any gazette notification affecting their lands. PW1 said that until now no compensation was paid to them for taking away their lands. He said that they expected the second and third defendants to issue the land titles to them instead of to the first defendant as they were the rightful owners or claimants to the said lands. He said that the alienation of the lands to the first defendant by the second and third defendants had affected their rights, traditions and cultures and disrupted their livelihoods.

[23] PW2 is also a community leader of the Kedayans at Sibuti. He was appointed a *Penghulu* in December, 1999. His evidence as contained in his witness statement was similar to that of and corroborated the evidence of PW1 on the plaintiffs' claims to their NCR lands.

[24] In Suit 22–19 of 2003, Karim bin Enur ('PW5') was appointed a *Penghulu* of their community by the resident of Miri Division in 1992. He testified that their ancestors originally settled in Baram and migrated to their present village in Bakam in 1910 under his grandfather who died at the village in the 1930's. He said his grandfather was awarded the 'Orang Kaya' title by the then Sultan of Brunei and was also honoured by the Sarawak Government under Raja Vyner Brooke with a 'Long Service Decoration' medal.

[25] He said that their NCR lands are within the compound of their village and the farthest plot of land is within 30 minutes walk from their village. They visited and farmed their lands daily which had been cultivated and occupied by their ancestors and inherited by them. He said their lands are planted with fruit trees.

[26] PW5 said each of the plaintiffs in this suit filled in and signed a form to confirm their claims and he verified their claims as their *Penghulu* by signing on the forms. He testified that he and the other plaintiffs appointed PW4 to survey their lands which was carried out from 1996–1997. The survey was carried out with the assistance of all the plaintiffs who identified the locality and size of their individual plot of land to PW4 during the survey. The forms were tendered as exh P7 and the map prepared by PW4 in respect of the survey of their lands was tendered as exh P8. The total areas claimed by them amounted to 2480 acres.

[27] He said that in 2001 they heard rumours that their lands had been alienated to the first defendant and a provisional lease had been issued in respect thereof. He said that he together with Madani bin Wahat ('PW6') and Asin bin Bujang went to the office of the second defendant to inquire and found that their lands had been alienated to the first defendant without their knowledge. He said that they were never consulted nor given any compensation when their lands were taken away and given to the first defendant. He said that the land should have been alienated to them with the title thereto because their ancestors had cleared and farmed the lands since 1910 and they had inherited the lands.

[28] He said that some of them had in fact been issued with documents of title in respect of other parcels of land in the vicinity. He said that he was previously issued with a title for a parcel of native land described as Lot 713 Block 14 Lambir Land District with an area of 1.93500 hectares and that he

had sold the land. He said that this fact established that the area claimed by them were native customary land. PW6 gave evidence which was similar to that of PW5.

[29] In these two suits, it is not in dispute that the plaintiffs did not personally clear the virgin jungles and create or acquire the NCR over the lands from their own efforts. They claimed that their ancestors had settled in the respective areas and had cleared and farmed the lands in 1909–1910 respectively ie prior to 1 January 1958. They claimed that they have inherited the NCR lands from their forefathers and that the NCR still subsist.

[30] Have the plaintiffs proved their NCR claims to the lands on a balance of probabilities? I am aware of the evidentiary difficulties faced by the natives, in this case the plaintiffs, in proving their NCR which originate in times of limited record keeping and that the court ought to take a realistic and sympathetic approach when applying the rules of evidence: see *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204; [2010] 1 LNS 114 and *TR Nyutan ak Jami & Ors v Lembaga Pembangunan Dan Lindungan Tanah & Ors, Kuching High Court* Suit No 22–249 of 1998. I am also aware of the comments made by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor anak Nyawai & Ors* [2005] MLJU 266; [2005] 3 CLJ 555 that the self-serving testimonies of some of the witness should carry little or no weight in the absence of some other credible corroborative evidence. In other words, what they have said during the trial must be tested against the evidence of the other witnesses, the undisputed facts in the case and the documentary exhibits referred to during the trial.

[31] From the evidence, each of the plaintiffs in these two suits had filled in and signed a 'Surat Pengesahan dan Pengakuan' to claim their individual plot of land and each plot or parcel was referred to as a field lot, for example F/L125. PW1 had on 6 May 1999 signed on these forms and had on 3 May 1999 signed the map P1(A) as their *Penghulu* whereas PW2 had on 28 March 2002 signed on the forms and on 21 July 2000 signed on P1(A) as their *Penghulu* to verify their claims. PW5 signed on the forms (P7) in 1999 and on the map (P8) on 3 July 2002 as their *Penghulu* to verify their claims. The evidence showed that the map P1(A) did not exist on 3 May 1999. PW1 used the date because it was the date stated in the forms and used by the other claimants. Based on the dates used by PW2 and PW5, the maps were likely to be ready only in 2002. They said that they verified the claims to the individual plot of land based on what the other plaintiffs had told them. From the evidence, it was obvious that they had no personal knowledge of each and every claim made by the other plaintiffs. For example, PW1 did not know how many of the plaintiffs lived in Kampung Satap or in Kampung Selanyau or Kampung Kawang or in the other villages or when were some of the villages established.

[32] PW4 prepared the two maps respectively marked as M (exh P1(A), P1(B) and P8). He said that in 1996 the plaintiffs in Suit 22–19 of 2003 requested him to survey their NCR lands at Kampung Bakam which was completed in 1996–1997. He said that in 1998 the plaintiffs in Suit 22–16 of 2003 requested him to survey their NCR lands near to Kampung Opak, Kampung Batu Satu Beraya and Kampung Selanyau.

[33] He said that in each case he made a few trips to the lands to do his survey works with the assistance of each plaintiff and their family members who pointed out the boundary and the size of their individual plot of land to him. Upon completion of his field works, he transferred and charted his field notes and data onto a topography map which he photocopied from the office of the Lands and Surveys Department, Miri. The two topography maps were the two maps marked as 'M'. The maps were prepared by him based on what the plaintiffs had told him regarding the locality and size of their individual plot of land. He had no personal knowledge of each of the plaintiffs' NCR claims. The maps did not provide any bearings and or reference points and were not drawn to scale. The maps did not show the locality of or the distance of the claimed NCR lands from Kampung Opak, Kampung Batu Satu Beraya, Kampung Selanyau or Kampung Bakam or Sungai Jalid or Sungai Payau. PW4 in his evidence agreed that the two maps prepared by him were only sketch plans of the plots of land and were not proper maps or survey plans. Therefore, little weight should be given to the two maps prepared by PW4 for and on behalf of the plaintiffs in these two suits.

[34] Looking at the forms (exh P7), the plaintiffs in Suit 22–19 of 2003 filled in and signed their forms to claim their individual plot of land in 1999, after PW4 said he had completed his survey in 1996–1997. Similarly, the plaintiffs in Suit 22–16 of 2003 filled in and signed their claim forms (P2) in 1999 after PW4 had completed the survey.

[35] The evidence showed that PW1 claimed F/L125 which contained 18.30 acres for himself. The evidence showed that he was asked to point to his plot of land on the map (exh P1(B)) but he was unable to do so even after 15 minutes. He was asked and he did not know the date of birth of his father though he knew that his father passed away in April 1972. Similarly, the evidence showed that PW4 took about 30 minutes to answer a question and eventually said that he did not want to answer the question (see pp 134–135 NOP).

[36] None of the plaintiffs in either suit had been born yet in 1909 or 1910 or the 1920's or 1930's when their ancestors had purportedly cleared and settled on the lands. PW1 was born in 1940, PW2 in 1949 and PW5 in 1943. Their evidence or accounts of their respective NCR claims were based on what

they heard or what they were told or from family oral history. None of them had exhibited their birth certificate which would have shown the name of their parents and their place of birth. These would have substantiated their claims that they were born at their village or at the claimed NCR lands.

[37] PW1 testified on the tomb stone which was dated 1909 and he said this piece of evidence was never challenged by the defendants. However, he never produced any photograph of this tomb stone which was dated 1909 or any proof to substantiate what he said. PW7 took the photographs which were referred to during the trial and testified that there was a tomb stone dated 1824 but PW7 also did not refer to any specific photographs to show the tomb stone with the date '1909' on it or the tomb stone with the date '1824' on it. The photographs were not tendered as exhibits. PW2 in his cross-examination said that he did not know how old were the graves found on their NCR lands. The maps prepared by PW4 did not refer to any graves within the claimed NCR lands.

[38] PW5 said that his father was awarded the *Orang Kaya* title by the then Sultan of Brunei and awarded the Long Service Medal by Raja Vyner Brooke but he did not exhibit any certificate, medal or photograph to substantiate his claims. PW5 also said the areas claimed by them were native customary land and that some of them had been issued a document of title for other parcels of NCR land which belonged to them. PW1 said that he was previously issued a document of title to a parcel of NCR land described as Lot 713 Block 14 Lambir Land District and that he had sold this parcel of land. However, he did not exhibit a copy of the document of title or the sale and purchase agreement or memorandum of transfer to substantiate what he had said.

[39] The plaintiffs had referred to certain documents which were marked for identification as 'ID6' and 'ID9'. These documents were not tendered as exhibits. Notwithstanding that, ID6A showed that it was a verification of land boundary of a parcel of land described as F/L45 claimed by Sapar bin Ismail. ID9A showed that the documents were in respect of a case '*Mustapha bin Ujan (40 orang) v Nawang bin Malik (13 orang)*' in the Native Court.

[40] In Suit 22–16 of 2003, Sapar bin Ismail claimed F/L33 as his NCR land and not F/L45 which was claimed by Alim bin Ahim. In Suit 22–19 of 2003, F/L45 was claimed by Sini bin Tagap as his NCR land and not by Sapar bin Ismail. Therefore, the documents in respect of F/L45, ID6 and ID9 did not relate to the same plot of land claimed by the plaintiffs in these suits and did not substantiate the testimony of the plaintiffs' witnesses that the areas claimed by them were native customary land.

[41] Learned counsel for the plaintiffs also referred to an article '*Kampung*

Selanyau: Social and Economic Organizations of a Kedayan Rice- growing village in Sarawak' written by Clifford A Sather and Hatta Solhee and published in the Sarawak Museum Journal Special Issue Volume XXII in support of the evidence of PW1 and PW2 regarding the history of the settlement of the plaintiffs' ancestors at Sibuti in general and at Kampung Selanyau in particular. This article was based on a field study carried out by the authors who had prepared an earlier project report in 1973. This article gave a brief history of the migration of the Kedayan from Brunei to Sibuti and the settlement at Kampung Selanyau.

[42] It stated that the village was founded in the late 1920's and early 30's by families from Kampung Bungei, an early Kedayan settlement in the Sibuti area and from Kampung Gadong in Brunei. It stated that the settlers were attracted to Selanyau by its rich *padi* land. These, contrary to the submissions of the plaintiffs' counsel, did not support what PW1 had said that the plaintiffs' ancestors originally migrated from Sungai Kedayan in Brunei.

[43] The article also did not refer to any mysterious illness or epidemic which caused the Kedayans in the Sibuti area to move to Kampung Selanyau and the other villages. If the mysterious illness or epidemic was the cause of the migration to Kampung Selanyau and the other villages, the article would have made reference to it since it was based on interviews with the inhabitants of Kampung Selanyau which purportedly included some of the plaintiffs in Suit 22–16 of 2003.

[44] The evidence showed that parts of the lands claimed by the plaintiffs in Suit 22–16 of 2003 were in 1966 issued with a timber licence T/0029 (exh D16) by the Forests Department to the first defendant. Since then the first defendant had entered into the licensed areas to legally harvest timbers pursuant to the timber licence. The licence was renewed annually until 31 July 2005. Another timber licence T/0030 was issued to Yak Lee Timber Company Ltd, also in 1966, and this was confirmed by PW1 during his cross-examination. PW1 said that he had worked for this timber company for many years.

[45] If two timber licences were issued in respect of the areas claimed by them as their NCR lands and were being logged for timbers since 1966 and without any protest by the plaintiffs, these raised serious doubts on their evidence that the lands were settled by their ancestors and planted with *padi* and fruit trees. There would be little or no merchantable timbers to be extracted if the lands had been cleared and planted with *padi* and fruit trees. Further, why did PW1 and the other plaintiffs not protest or take actions against the licences or the timber companies at the material times since the logging would have affected and or impaired their NCR lands? Why did they not claim or submit

their claim to their NCR lands to the lands and surveys earlier but waited until 2001, after the two parcels of land had been alienated to the first defendant? A

[46] The aerial photographs taken in 1947 and 1951 for the Sarawak Government showed that the areas claimed by the plaintiffs in both suits were then virgin jungles. These contradicted their claims that their ancestors had in 1909–1910 cleared the virgin jungles, planted *padi* and fruit trees and had settled on the lands since then. The plaintiffs submitted that the jungles or forests had grown back from 1909–1947 or 1951 so that they again looked like virgin jungles from the air when the aerial photographs were taken. There was no such evidence. If their ancestors had been tending to their farms as alleged, how could they become jungles or forests again. The farms or NCR land had to be abandoned for a long period for the jungles or forests to grow again. These again raised serious doubts on the plaintiffs' evidence regarding their NCR claims. B C D

[47] DW1 (Abdul Razak bin Morshidi) was the Land Officer with the Lands and Surveys Department, Miri Division from 15 November 2004 until 30 June 2009. He testified that the standard procedure and practice of the Lands and Surveys Department, Sarawak, before a provisional lease was issued, was that the department would determine the status of the land applied for. This would be based on the official records, namely the cadastral plan, aerial photographs, land use maps derived from the aerial photographs and other official records of other departments such as the Forests Department of Sarawak. E F

[48] He said that the boundary of a land proposed to be alienated and to be issued with a provisional lease would be adjusted to exclude areas which might have encumbrances or already held under land titles. He said that in other words, based on the aerial photographs and the land use map, the boundary of the land under a provisional lease would exclude all cleared, cultivated or farmed areas because they were likely to have native customary rights or claims and were regarded as encumbrances. The land recommended to be issued with a provisional lease would be free from any encumbrances. DW1 said that once the area which was free from encumbrances was marked out, the plan showing the area and the terms and conditions of the provisional lease would be forwarded to the departmental headquarters for approval. G H

[49] DW1 testified that the provisional lease for Lot 3927 Lambir Land District containing an area of 1,004 hectares was issued on 14 April 1997. It was declared as Mixed Zone Land vide the Lambir Land District (Mixed Zone Land) Declaration Order 1996 vide *Gazette* Notification No Swk LN 30 published on 20 June 1996. The provisional lease was issued to the first defendant. I

[50] He testified that the provisional lease for Lot 3935 Lambir Land District containing an area of 1,180 hectares was issued on 6 February 2001. The land classification for Lot 3935 Lambir Land District is Mixed Zone Land which was published in *Gazette* Notification No Swk LN 71 as the Miri Division (Mixed Zone Land) (No 2) Declaration Order 1999 which was published in the *Gazette* on 14 October 1999. He said that the provisional lease was also issued to the first defendant. He said that these provisional leases were issued pursuant to s 28 of the Land Code.

[51] DW3 (Saiful Izam bin Kassim) is a staff surveyor and cartographer with the Lands and Surveys Department Headquarters, Sarawak. His responsibilities or duties included being head of the aerial photo interpretation unit ('APIU') and cartography section. He was instructed to prepare a plan on the interpretation of aerial photographs over the areas claimed by the plaintiffs in Suit 22–16 of 2003(MR) and 22–19 of 2003(MR). He was shown a sketch plan of each of the areas claimed by the plaintiffs in both suits.

[52] He said that from his investigation and based on the pattern, shape, size, tone and texture contained in the aerial photographs which were taken in 1947 and 1951, there were approximately 125 hectares within the boundary of Lot 3935 which were cleared areas whereas there were approximately 1,056 hectares of primary or virgin jungles. These gave a total of approximately 1,181 hectares for Lot 3935. He said that for Lot 3927, there were approximately two hectares of land which were cleared areas whereas there were approximately 1,002 hectares of primary jungles. These gave a total of approximately 1,004 hectares for Lot 3927. These cleared areas would be excluded from Lot 3935 and 3927 when the perimeter surveys are carried out pursuant to s 28 of the Land Code.

[53] This evidence contrasted with the plaintiffs' evidence that their ancestors had cleared 1,181 hectares and 1,004 hectares of virgin jungles and had planted padi and fruit trees on the two parcels of land. There is no evidence before the court that any of the plaintiffs and or their ancestors had cleared the 125 hectares or two hectares respectively. From the evidence before the court, the plaintiffs, in each suit, have failed to prove their NCR claims on the balance of probabilities.

[54] The second and the third defendants have also submitted that the plaintiffs have not complied with the Government Proceedings Act, that the maps prepared by PW4 were not prepared in accordance with the Sarawak Land Surveyors Ordinance 2011, that it was not proper for the plaintiffs to challenge the issuance of the timber licences and or the provisional leases by way of this action and that this court has no original jurisdiction to grant the

reliefs sought by the plaintiffs. These issues were however not pleaded in the defence of the second and third defendants.

[55] The first defendant and the second to third defendants had, towards the end of the trial, each filed an application that the plaintiffs' challenge should be by way of a judicial review and I had dismissed the applications as being too late in the day as the trial was near completion at that point in time.

[56] I have in other similar or NCR cases ruled that s 84 of the Land Code does not oust the jurisdiction of the court to hear NCR disputes: see *Racha ak Urud @ Peter Racha Urud & Ors v Ravencourt and Ors* MR-21–4 of 2011.

[57] For the reasons given, the plaintiffs' suits are dismissed with costs to be taxed.

Suits dismissed with costs.

Reported by Afiq Mohamad Noor